
January 31, 2023

The Honorable Melony Griffith
Senate Finance Committee
3 East, Miller Senate Office Building
Annapolis, Maryland 21401

RE: Letter of Information – Senate Bill 38 – Minority Business Enterprise Procurement Contract Financing

Dear Chair Griffith and Committee Members:

The Maryland Department of Transportation (MDOT) takes no position on Senate Bill 38 but offers the following information for the Committee's consideration.

The Maryland General Assembly established the State's Minority Business Enterprise (MBE) Program in 1978. The MBE Program has been recodified, with amendments, under the State Finance and Procurement Article, Title 14, Subtitle 3. Periodically, the General Assembly has reenacted the law with amendments, but only after considering studies on disparities, Disparity Studies, in the utilization of minority and woman-owned firms in Maryland's marketplace. Findings of the Disparity Study assess data on the existence, extent, and impact of discrimination, if any, against minority and woman-owned firms on contracting opportunities within the public and private sectors within and/or in the proximity of the State.

Every aspect of the implementation of the MBE program, including State statutory and regulatory requirements, is controlled by the data that is contained in the State's Disparity Study, per the United States Constitution's 14th Amendment Equal Protection Clause. The Constitution requires that programs like the MBE Program, which use racial classifications to provide a benefit to specific classes of people based on immutable characteristics like race, must pass the judicial test of strict scrutiny by having the following two components:

- Compelling governmental interest - the existence of and need to remedy past or present discrimination (This is established through the data analysis of the State's MBE Disparity Study, which documents the existence of discrimination in Maryland's Marketplace.)
- Narrowly tailored - any remedies used to address the compelling interest must be narrowly tailored. (This component is satisfied through provisions of the MBE Program that provide flexibility in the programs operation such as requiring that contract goals and waivers be established on contract-by-contract basis and that each waiver request be evaluated and approved if deemed appropriate.)

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Senate Bill 38 bill makes changes to the MBE Program law that may impact the constitutionality of the Program. The bill creates the MBE Procurement Contract Financing Program (within MSBDFA) to provide capital to certified MBEs (with net worth under \$2M) with an aim toward facilitating those MBE's ability to enter into and perform under State procurement contracts. Such legislation may only be implemented if the State determines that there is an evidentiary basis for implementing race- and/or gender-based remedial measures and those measures are narrowly tailored to that evidence. It is unclear in Senate Bill 38 whether there is evidence and narrow tailoring sufficient to satisfy constitutional requirements. Furthermore, Senate Bill 38 changes the eligibility requirements of the MBE Program by raising the Personal Net Worth cap for MBEs to an amount that is higher than that allowed for other participants. None of the aforementioned policies are supported by data in the Disparity Study, making the policies legally impossible to implement without further analysis.

The Maryland Department of Transportation respectfully requests the Committee consider this information when deliberating Senate Bill 38.

Respectfully submitted,

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